

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs April 29, 2009

**STATE OF TENNESSEE v. COURTNEY PARTIN**

**Appeal from the Criminal Court for Campbell County  
No. 11082 E. Shayne Sexton, Judge**

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**No. E2008-01669-CCA-R3-CD - Filed October 8, 2009**

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This case is before the court after remand to the Campbell County Criminal Court for resentencing. The Defendant, Courtney Partin, was convicted of attempted first degree murder, a Class A felony, and two counts of aggravated assault, a Class C felony. The trial court merged one count of aggravated assault into the attempted first degree murder because the offenses involved the same victim and sentenced the Defendant as a Range I, standard offender to five years for aggravated assault and to seventeen years for attempted first degree murder, to be served consecutively, for an effective twenty-two year sentence. Both the Defendant and the State appeal. The Defendant contends that the trial court erred by (1) enhancing his aggravated assault conviction based on an improper enhancement factor and (2) excessively enhancing his attempted first degree murder conviction based upon two convictions arising from one case. The State argues that the trial court erred by beginning its sentencing consideration for the attempted first degree murder conviction at the minimum in the range instead of at the midpoint. Although we conclude that the trial court did not err when it enhanced the Defendant's first degree murder conviction based upon two convictions arising from one case, we hold that the trial court erred by applying an improper enhancement factor to the aggravated assault conviction and by beginning its sentencing consideration at a point lower than provided for a Class A felony conviction. We reverse the judgments of the trial court and remand the case for resentencing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed; Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Douglas A. Trant, Knoxville, Tennessee, for the appellant, Courtney Partin.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; William Paul Phillips, District Attorney General; and Michael Olin Ripley, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

## I. BACKGROUND

At the original sentencing hearing, the trial court sentenced the Defendant as a Range I, standard offender to twenty-four years for the attempted first degree murder conviction and to five years for the aggravated assault conviction, to be served consecutively, for an effective sentence of twenty-nine years. This court affirmed the judgments. The Defendant's application for permission to appeal to the Tennessee Supreme Court was denied. The United States Supreme Court granted certiorari, vacated the judgments, and remanded the case to this court for consideration of the sentences imposed in light of Cunningham v. California, 549 U.S. 270 (2007). Partin v. Tennessee, 549 U.S. 1196 (2007). This court remanded the case to the Criminal Court for Campbell County for resentencing with instructions to determine "the [D]efendant's prior criminal convictions and the appropriate enhancement weight to be applied to the [D]efendant's sentences for his present convictions."<sup>1</sup> State v. Courtney Partin, No. E2004-02998-CCA-R3-CD, Campbell County, slip op. at 6 (Tenn. Crim. App. Nov. 30, 2007).

At the resentencing hearing, the trial court concluded that it was "duty bound" to begin consideration of the Defendant's sentence for attempted first degree murder at the minimum in the range, or fifteen years. The State argued that the presumptive minimum sentence for attempted first degree murder was twenty years, the midpoint of the range. The trial court replied that a presumptive minimum no longer applied because the United States Supreme Court had determined that Tennessee's prior sentencing law was flawed. The trial court stated that there were "no presumptive minimums either at the midpoint or at the beginning point. There is the sentence, and there are enhancing and then mitigating factors . . . ." The State countered that the trial court was applying Tennessee's current sentencing statutes and not the pre-2005 sentencing statutes.

The Defendant's counsel stated that a one-year enhancement of the attempted first degree murder conviction was reasonable. The Defendant had two prior convictions for misdemeanor theft and misdemeanor possession of drug paraphernalia. The Defendant argued that the statutory minimum sentence of three years was appropriate for the aggravated assault conviction. The State countered that a three-year enhancement was appropriate for the attempted first degree murder conviction.

The State argued that the Defendant's sentence for attempted first degree murder should be enhanced with factor (9) because the Defendant employed the use of a deadly weapon when he committed aggravated assault against the attempted murder victim. See T.C.A. § 40-35-114(9) (Supp. 2001). The State said that the merger of one count of aggravated assault with the attempted first degree murder conviction did not alter the jury's finding that a deadly weapon was used in the perpetration of all the offenses.

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<sup>1</sup> On June 7, 2005, the Tennessee General Assembly amended the Tennessee Criminal Sentencing Reform Act of 1989. See T.C.A. §§ 40-35-102(6), -114, -210, -401 (2003 & Supp. 2005); 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. The Defendant committed the offenses before the enactment of the sentencing amendments. Therefore, the amended code sections are inapplicable to the Defendant's appeal.

The trial court found that applying the Defendant's use of a deadly weapon as an enhancement factor to the attempted first degree murder conviction would be inappropriate. However, the trial court found that the jury ruled affirmatively on the Defendant's use of a deadly weapon in committing the aggravated assaults and that it could be used as an enhancement factor but "not . . . as to attempted first degree murder." The trial court applied enhancement factor (9), use of a deadly weapon during the offense, to the aggravated assault charge. The trial court concluded that "it can be inferred from the Jury's verdict [of guilty] that they, in fact, passed upon that element of the offense and by virtue of that verdict – that guilty verdict, they have found that there was . . . sufficient proof to also apply that enhancing factor." The trial court also applied enhancement factor (1), a history of previous criminal convictions or behavior in addition to those necessary to establish the appropriate range, to the aggravated assault conviction. The trial court applied only enhancement factor (1) to the attempted first degree murder conviction.

In his appeal, the Defendant contends and the State concedes that the trial court improperly enhanced the aggravated assault conviction with enhancement factor (9) because a deadly weapon was already an essential element of the aggravated assault charged. Next, the Defendant argues that the trial court excessively enhanced his sentence for attempted first degree murder because two of his prior criminal convictions arose from one event and indictment. The State also appeals and argues that the trial court committed reversible error when it concluded it was "duty bound" to begin its sentencing consideration on the attempted first degree murder offense at the minimum in the range instead of at twenty years, which was the mid-range presumptive sentence for a Class A felony under the Sentencing Act that applied in this case.

## II. ANALYSIS

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (1997 & Supp. 2001); State v. Carter, 254 S.W.3d 335 (Tenn. 2008) (citing State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992)); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004). The presumption that the trial court's action is correct "is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f)-(g) (Supp. 2001). If the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the sentence may not be disturbed even if a different result were preferred. State v. Fletcher, 805 S.W.2d 786, 789 (Tenn. Crim. App. 1991). However, if the trial court applies inappropriate factors or fails to follow the statutory sentencing procedure, the sentence's presumption of correctness fails and the appellate court's review is purely de novo. Carter, 254 S.W.3d at 344-45 (citing Shelton, 854 S.W.2d at 123); Pierce, 138 S.W.3d at 827 (citing State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997)). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401

(1997) Sent'g Comm'n Cmts. A review of the record reveals that the trial court erred when it applied inappropriate factors and failed to follow the statutory sentencing procedure.

**A.**

The Defendant was convicted of attempted first degree murder, a Class A felony. T.C.A. § 39-11-117(a)(2) (1997 & Supp. 2001). Under the applicable law, the presumptive sentence for a Class A felony is the midpoint of the range if there are no enhancement or mitigating factors. T.C.A. § 40-35-210(c) (Supp. 2001). Enhancement factors should be applied first and the sentence should be reduced by any mitigating factors. Id. § 40-35-210(d), (e).

The trial court concluded that Blakely v. Washington, 542 U.S. 296 (2004), required it to begin consideration of the Defendant's sentence at fifteen years. The trial court stated that the presumptive minimums no longer applied. Although the trial court is correct that the current Sentencing Act does not apply presumptive minimums, the pre-2005 Sentencing Act under which the Defendant was convicted did apply presumptive minimums. The Defendant committed the offenses in January 2002, and the sentencing statutes in effect at that time apply to his case.

Blakely prohibits sentences "above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." Cunningham, 549 U.S. at 275 (citing United States v. Booker, 543 U.S. 220 (2005); Blakely, 542 U.S. 296; Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000)). The "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely, 542 U.S. 296, 303-04; Cunningham, 549 U.S. at 275. Nothing in Blakely requires a sentencing court to begin with a statutory minimum sentence. In this case, the presumptive minimum sentence for the Defendant's Class A felony conviction was twenty years. T.C.A. §§ 40-35-101 (sentencing ranges), -210(c) (1997 & Supp. 2001). Under the 1989 Sentencing Act, the trial court should have started with a twenty-year sentence and then applied any enhancement factors.

**B.**

The trial court enhanced the Defendant's sentence for the attempted first degree murder conviction based upon the Defendant's prior convictions for misdemeanor theft and misdemeanor possession of drug paraphernalia. The Defendant asserts the convictions for theft and drug paraphernalia possession arose out of one event and indictment. At the sentencing hearing, the Defendant argued that because these convictions arose out of one indictment, they should be considered as a single event. In his brief, the Defendant cites only to the sentencing considerations contained within Tennessee Code Annotated section 40-35-103. A defendant who commits theft and who possesses drug paraphernalia is guilty of two crimes. Simply because a defendant is arrested for theft and is found to possess drug paraphernalia does not require the court to merge the offenses into a single crime. We hold that the trial court did not err when it enhanced the Defendant's sentence for attempted first degree murder based on the Defendant's prior misdemeanor convictions.

Although the State did not raise this error on appeal, we note that use of a deadly weapon can be used to enhance the Defendant's sentence for attempted first degree murder. See T.C.A. § 40-35-114(9) (Supp. 2001). Use of a deadly weapon is not an element of attempted first degree murder. See T.C.A. §§ 39-12-101, 39-13-202 (1997 & Supp. 2001). The jury found beyond a reasonable doubt that the Defendant used a deadly weapon when he committed aggravated assault against the same victim. In State v. Baker, the defendant burglarized a home and raped one of its occupants. 956 S.W.2d 8, 10 (Tenn. Crim. App. 1997). He was convicted of aggravated burglary and aggravated rape. Id. This court held that use of a deadly weapon could be used to enhance the aggravated burglary but not the aggravated rape because although use of a deadly weapon was already an element of aggravated rape, it was not an element of aggravated burglary. Id. at 17. We conclude that the Defendant's case is analogous to Baker. At resentencing, the trial court is not prohibited from applying enhancement factor (9), use of a deadly weapon, to the Defendant's attempted first degree murder conviction.

### C.

The trial court found that the Defendant's conviction for aggravated assault could be enhanced by enhancement factor (9), the Defendant's use of a deadly weapon. The trial court found that the jury affirmatively ruled on this enhancement factor. We hold that the trial court misapplied enhancement factor (9) because it was already an element of the offense as charged in the indictment.

An enhancement factor may not be an essential element of the offense as charged in the indictment. T.C.A. § 40-35-114 (Supp. 2001). Poole, 945 S.W.2d at 98; State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995); see State v. Reid, 91 S.W.3d 247, 312 (Tenn. 2002). The Defendant was charged with aggravated assault by placing the victims in fear and using a deadly weapon. See T.C.A. §§ 39-13-101(2), -102(1)(B) (1997 & Supp. 2001). The jury found beyond a reasonable doubt that the Defendant used or displayed a deadly weapon in the commission of these offenses. Because the use of a deadly weapon is an essential element of the crime of which the Defendant was convicted, we hold that the trial court erred when it determined that the use of a deadly weapon was an enhancement factor to the Defendant's aggravated assault conviction. However, we hold that the trial court did not err when it applied enhancement factor (1), a history of criminal convictions, to the Defendant's aggravated assault conviction.

### III. CONCLUSION

In consideration of the foregoing and the record as a whole, we reverse the judgments of the trial court and remand the cause for resentencing consistent with this opinion.

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JOSEPH M. TIPTON, PRESIDING JUDGE